



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Cause 728 of 2012

KENYA SHOE AND LEATHER WORKERS UNION.....CLAIMANT

VERSUS

HR STRATEGIC PARTNERS LIMITED.....RESPONDENT

AWARD

By Memorandum of Claim dated 2nd May 2012 and filed in Court on the same day, the Claimant **Kenya Shoe and Leather Workers Union** alleges unlawful/wrongful termination of its member **Mr. Vuncarl Oyugi**, the grievant and prays for the following orders:-

1. One month notice in lieu - Kshs.8,000.00
2. 4 days worked - Kshs.1,230.00
3. 4 years unattended leave - Kshs.25,846.15
4. Gratuity @ 15 days for the 5 years - Kshs.23,076.92

5. 12 months compensation for loss of employment as provided for in Section 15 of the Employment Act 2007 and Industrial Court Act 2011 – Kshs.96,000.00.

TOTAL Kshs.154,153.00/=

The Respondent **HR Strategic Partners Limited** filed its Memorandum of Reply dated 18th July 2012 on the same date. In the reply the Respondent admits employing the Grievant as a casual labourer up-to 4th October 2011. The Respondent avers that the Grievant was lawfully terminated after being warned and afforded an opportunity to defend himself. The Respondent further alleges that there is no Recognition Agreement between the Claimant and the Respondent and that the Respondent is a stranger to the proceedings. The Respondent prays that the claim be dismissed with costs.

The case was first mentioned before Hon. Justice Paul Kosgei (now retired) on 2nd May 2012 in the absence of both Claimant and Respondent. The case was then fixed for further mention on 27th July 2012.

The case was mentioned by Hon. Justice Isaac E.K. Mukunya (now retired) on 27th June 2012 when Mr. David Omolo appeared for the Claimant and Mr. Kandie appeared for the Respondent. The Respondent was directed to file Statement of Response on or before 18th July 2012 and the case fixed for hearing on 29th November 2012.

The case came before me for hearing on 29th November 2012 when Mr. Isaiah Odhiambo appeared for

the Claimant but there was no appearance for the Respondent.

After satisfying myself that the date was taken by consent in Court I allowed the Claimant to proceed with its case.

The Claimant called the Grievant **VUNCARL BOOKER OYUGI** who testified that he was employed as a Shoemaker on 1st January 2007 at a salary of Shs.6,000/-. His last salary was Shs.8,000/= consolidated and was paid monthly through Equity Bank. He testified that on 20th September 2011 he fell sick and sought permission to go to hospital where he was treated and given 2 days of duty. He took the report to the factory and was allowed to go home and back to work after 2 days. He reported back to work on 22nd September and worked until 4th October when he was called by the Supervisor at about 8.30 a.m. and asked why he was not on duty on 20th and 21st September 2011. He explained that he was sick and was asked to produce documentary proof which he did. The Supervisor rejected the documents he produced and demanded the main hospital card. He went back to hospital where he was advised that the card cannot be released as the hospital keeps it for medical history. The doctor gave him a note explaining the same which he took to the Supervisor. He was told by the supervisor to go back home and come back the following day. When he reported on 5th October he was told to wait at the reception where he was handed the letter of termination. The reason for termination in the letter was absenteeism. He referred to a copy of the letter attached to his Memorandum of Claim as Appendix 1. He said the Supervisor who dismissed him by name James Njoroge is the same one who had given him permission to go to the hospital on 20th September 2011. He testified further that he was not given any show cause letter, and there was no hearing. He further said he had not been given a warning letter.

I have carefully considered the contents of the Memorandum of Claim and annexures thereto, the Memorandum of Reply and the annexure, the Grievant's oral testimony and the Claimants oral submissions in Court.

The issues for determination are as follows:-

- 1) whether the Grievant was a casual employee.
- 2) whether the Grievant was unlawfully terminated.
- 3) whether the Grievant is entitled to the prayers sought.

1. Whether Grievant was a casual

The Respondent has in the defense alleged that the Grievant was a casual employee paid fortnightly. Casual employee is defined in Section 2 of the Employment Act as;

“a person the terms of whose engagement provide for his payment at the end of each day and who is not engaged for a longer period than twenty four hours at a time.”

From this definition, the Grievant who was, as alleged by Respondent, paid fortnightly, was not a casual. The Respondent also does not deny that the Grievant was in continuous employment from 4th August 2006 to 4th October 2011. Under Section 37 of the Employment Act, a casual employee who works continuously for 1 month is deemed to be on a monthly contract of service.

For these reasons I find that the Grievant was on a monthly contract of service.

2. Whether the Grievant was unlawfully terminated

The Grievant testified that he was terminated for being absent on 20th and 21st September 2011. He further testified that he sought permission from his Supervisor to whom he also submitted the sick off chit

after coming from hospital. The Respondent on the other hand avers that the Grievant was warned, afforded an opportunity to remedy his absenteeism and was given an opportunity to be heard but ignored/failed to defend himself. The Respondent did not attach any evidence to prove the averments. The termination letter also does not mention that the Grievant was given an opportunity to defend himself. The letter merely lists a litany of offences and concludes by the sentence as follows:-

“Following the unacceptable behaviours’, you are hereby relieved all your duties with immediate effect.”

This does not reflect any hearing or opportunity given to the Grievant to defend himself.

The Employment Act is very specific about the procedure to be followed for termination of employment to be lawful. There must be valid reason, fair procedure must be followed and the employee must be given an opportunity to defend himself. All these were not complied with by the Respondent.

I find that the termination of the Grievant was both wrongful and unlawful.

3. Whether the Grievant is entitled to the prayers sought

The Claimant prays for the following reliefs:-

- i) Reinstatement, or in the alternative.
- ii) Notice
- iii) 4 days worked
- iv) 3 years leave
- v) Gratuity @ 15 days for 5 years.
- vi) 12 months compensation.

(i) Reinstatement

The Grievant in his testimony did not ask the Court for reinstatement. He only prayed for compensation. I also find that given the circumstances of this termination reinstatement would not be appropriate.

I therefore decline to grant the prayer for reinstatement.

(ii) Notice

Having been terminated without notice, the Grievant is entitled to one month’s salary as notice. The Respondent stated that the Grievant was paid Shs.340 per day. In view of the provisions of Section 37(2) that an employee who works for six days is entitled to pay for the 7th day which is a rest day, I find that the Claimant is entitled to Shs.340x30 being Shs.10,200/=. I award him the same being payment in lieu of notice.

(iii) 4 days worked

The Respondent has submitted that the Grievant was paid salary up-to 4th October 2011. The Respondent has referred to its Appendix 1 as proof of such payment. Appendix 1 has 2 pages with names including the Grievants on both pages, the 1st page showing a figure of Shs.5,023.10 and the 2nd page showing a sum of Shs.1,714.00 against the Grievant’s name. No explanation is given about these figures. As correctly pointed out by the Claimant the list has no heading, is not signed and does not disclose its

source. It however has a stamp of Equity Bank Limited Branch with a date stamp of 14th January 2011. It cannot be evidence of payment of salary for October 2011.

I therefore grant Shs.1360 to the Grievant being payment of 4 days salary at the rate of Shs.340 per day.

(iv) 3 years leave

The Respondent in its defense did not make any comment about the prayer for leave by the Claimant. In the absence of denial or proof of leave taken I presume that the Grievant did not go for leave for the 3 years as prayed by the Claimant. Minimum leave is 21 days. 3 years leave would be 63 days at the rate of Shs.340 per day amounting to Shs.21,420. I award him the same amount.

(v) Gratuity 15 days for 5 years

The Grievant testified that he was not a member of NSSF. Under Section 35(5) of the Employment Act he is entitled to service pay. The rate has not been determined by the Minister for Labour but the practice has been to use 15 days as provided for severance pay upon redundancy. The Claimant has asked for payment at the same rate under the heading gratuity.

Having worked from 1st January 2007 to 4th October 2011, the Grievant's complete years of service are 4. I therefore award him service pay at the rate of 15 days per year at the rate of Shs.340 per day amounting to Kshs.20,400.

I award him the same sum.

(vi) 12 months Compensation

During conciliation the conciliator awarded the Grievant 4 months' salary as compensation. Neither the Claimant nor the Respondent addressed the issue of why the said recommendation would not be acceptable. The Claimant prays for 12 months compensation while the Respondent has not made any comment on the same. I find no reason to interfere with the recommendation and award the Grievant 4 months compensation at 30 days x 4 x 340 amounting to Shs.40,800.

In summary, I award the Claimant the total sum of Shs.94,180. The Respondent shall also pay Claimant's costs.

Orders accordingly.

Read in open Court and signed on this 2nd day of April, 2013.

HON. LADY JUSTICE MAUREEN ONYANGO

JUDGE

Mr. David Omollo for the

In the presence of:- _____ Claimant

Mr. Kandie for the

_____ Respondent